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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART,  
INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim  
Plaintiff,

v.

SHEPARD FAIREY, OBEY GIANT ART, INC.,  
OBEY GIANT LLC and STUDIO NUMBER ONE,  
INC. and ONE 3 TWO, INC. (d/b/a OBEY  
CLOTHING)

Counterclaim Defendants.

**ANSWER AND AFFIRMATIVE  
DEFENSES OF PLAINTIFFS AND  
COUNTERCLAIM DEFENDANTS  
SHEPARD FAIREY, OBEY GIANT  
ART INC., OBEY GIANT LLC, AND  
STUDIO NUMBER ONE, INC. TO  
MANNIE GARCIA’S FIRST  
AMENDED ANSWER,  
AFFIRMATIVE DEFENSES,  
COUNTERCLAIMS AND CROSS-  
CLAIMS**

09-CV-01123 (AKH)  
ECF Case

and

MANNIE GARCIA,

Defendant, Counterclaim  
Plaintiff and Cross-claim  
Plaintiff/Defendant,

v.

SHEPARD FAIREY and OBEY GIANT ART,  
INC.,

Counterclaim Defendants.

and

THE ASSOCIATED PRESS,

Cross-claim  
Plaintiff/Defendant.

Plaintiffs-Counterclaim Defendants Shepard Fairey and Obey Giant Art, Inc. and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc. by and through their attorneys, answer the correspondingly numbered paragraphs of the First Amended Counterclaims of Defendant Intervenor Mannie Garcia (hereinafter “Garcia”), dated December 3, 2009, as follows:

**NATURE OF THE ACTION AND RELIEF SOUGHT**

- 53. Deny ¶ 53, except admit that Garcia took the Garcia Photo and admit that Garcia purports to hold copyright Registration No. VA 1-665-426 in the Garcia Photo.
- 54. Deny information or knowledge sufficient to form a belief as to ¶ 54.
- 55. Deny information or knowledge sufficient to form a belief as to ¶ 55.
- 56. Deny information or knowledge sufficient to form a belief as to ¶ 56.

57. Deny information or knowledge sufficient to form a belief as to ¶ 57.

58. Deny ¶ 58, except admit that Garcia took the Garcia Photo on April 27, 2006 at the National Press Club.

59. Deny ¶ 59, except admit that Shepard Fairey used the Garcia Photo as a reference in creating the illustration that appears on the Obama Works and admit that Obey Giant Art, Inc. sold sweatshirts bearing the “Hope” image and posters based on the Obama Works and admit that Obey Giant LLC earned revenues from the sale of clothing by Obey Clothing based on the Obama Works.

60. Deny ¶ 60, except admit that Plaintiffs filed a complaint for declaratory relief and refer to that document for its entire contents.

61. Deny ¶ 61, except admit upon information and belief that The AP claims that it owns the copyright in the Garcia Photo.

62. Deny ¶ 62.

63. Deny ¶ 63.

64. Deny ¶ 64.

65. Deny ¶ 65, except admit that for a time period Obey Giant Art Inc. offered for sale a sweatshirt bearing the “Obama Hope” illustration at the Web site <http://www.obeygiant.com/store>.

66. Deny ¶ 66.

67. Deny ¶ 67.

68. Deny ¶ 68.

69. Deny ¶ 69.

## **PARTIES**

70. Deny information or knowledge sufficient to form a belief as to ¶ 70, except admit that the AP purports to be a New York not-for profit corporation with its principal place of business at 450 West 33<sup>rd</sup> Street, New York, N.Y. 10001.

71. Deny ¶ 71, except admit that Shepard Fairey is a visual artist, graphic designer, merchandiser and business owner who resides in Los Angeles, California.

72. Deny ¶ 72, except aver that Obey Giant Art Inc. is a California corporation located at 1331 West Sunset Blvd., Los Angeles, California, 90026, and engages in the business of selling and distributing Shepard Fairey's artwork, graphic designs and merchandise.

73. Deny ¶ 73, except admit that Obey Giant, LLC is a California Limited Liability Corporation located at 1331 West Sunset Blvd., Los Angeles, California, 90026.

74. Deny ¶ 74, except admit that Studio Number One, Inc. is a California Corporation located in 1331 West Sunset Blvd., Los Angeles, California, 90026.

75. Admit ¶ 75 upon information and belief.

76. Deny information or knowledge sufficient to form a belief as to ¶ 76.

### **JURISDICTION AND VENUE**

77. Deny ¶ 77, except admit that Garcia purports to base jurisdiction for his cross claims and counterclaims upon the authorities recited in ¶ 77.

78. Deny ¶ 78, except admit that this Court has personal jurisdiction over Shepard Fairey, Obey Giant Art, Inc., Obey Giant, LLC and Studio Number One, Inc.

79. Deny knowledge and information sufficient to form a belief as to ¶ 79, except admit that this Court has personal jurisdiction over The AP.

80. Admit that venue is properly lain in this district.

## **FACTUAL BACKGROUND**

81. Deny ¶ 81, except admit that Garcia purports to hold copyright Registration No. VA 1-665-426 in the Garcia Photo and admit that Garcia took the Garcia Photo on April 27, 2006 at the National Press Club.

82. Deny information or knowledge sufficient to form a belief as to ¶ 82.

83. Deny ¶ 83, except deny knowledge and information sufficient to form a belief as to the number of images taken by Garcia at the National Press Club Event and the number of images Garcia transmitted to the AP.

84. Deny ¶ 84.

85. Deny ¶ 85.

86. Deny ¶ 86.

87. Deny ¶ 87.

88. Deny ¶ 88, except admit that Obey Giant Art, Inc. registered the copyright Obama Hope (Reg. No. VA0001651318), Obama Progress (Reg. No. VA0001651319) and Obama Change (Reg. No. VA0001651320), works By Shepard Fairey, and admit that the copyright applications for the “Hope,” “Progress,” and “Change” works do not identify the Garcia Photo in the “Material Excluded” section of the applications.

89. Deny ¶ 89, except admit that the Clooney Photo is attached as Exhibit C to the Answer and Counterclaims of The AP.

90. Deny information or knowledge sufficient to form a belief as to ¶ 90.

91. Deny information or knowledge sufficient to form a belief as to ¶ 91, except admit that The AP purports to hold a copyright registration in the Obama Photo.

92. Repeat and reallege each and every response to ¶¶ 53 to ¶ 91 above as if

fully set forth herein.

93. Deny ¶ 93.

94. Deny ¶ 94.

95. Repeat and reallege each and every response to ¶¶ 53 to ¶ 94 above as if

fully set forth herein.

96. Deny ¶ 96.

97. Deny ¶ 97.

98. Deny ¶ 98.

99. Deny ¶ 99.

100. Deny ¶ 100.

101. Repeat and reallege each and every response to ¶¶ 53 through ¶ 100

above as if fully set forth herein.

102. Deny ¶ 102, except deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning how The AP obtained a copyright registration pertaining to the Garcia Photo.

103. Deny ¶ 103, except admit that Obey Giant Art, Inc. registered the copyright in the Obama Hope (Reg. No. VA0001651318), Obama Progress (Reg. No. VA0001651319), and Obama Change (Reg. No. VA0001651320) works.

104. Deny information or knowledge sufficient to form a belief as to ¶ 104.

105. Deny ¶ 105.

106. Deny ¶ 106.

107. Deny ¶ 107.

108. Deny ¶ 108.

109. Deny ¶ 109.

**PRAYER FOR RELIEF**

Deny Garcia is entitled to any relief.

**AFFIRMATIVE DEFENSES**

**FIRST DEFENSE**

1. Intervenor-Defendant's counterclaims are barred because the alleged infringement is a non-infringing fair use as set forth in 17 U.S.C. § 107 and the common law.

**SECOND DEFENSE**

2. Intervenor-Defendant's counterclaims are barred in whole or in part by the First Amendment of the United States Constitution.

**THIRD DEFENSE**

3. Intervenor-Defendant's alleged copyright registration is invalid or unenforceable due to the failure to comply with the requirements of Title 17 of the United States Code.

**FOURTH DEFENSE**

4. Any damages and profits sought by Intervenor-Defendant are limited, in whole or in part, pursuant to 17 U.S.C. §504(b) and exclude deductible expenses and any elements of profit attributable to factors other than the alleged infringement of Intervenor-Defendant's copyrighted work.

**FIFTH DEFENSE**

5. Any statutory damages sought by Defendant pursuant to 17 U.S.C. §504(c) are limited, in whole or in part, because any alleged infringement was not committed

willfully and Fairey was not aware and had no reason to believe that his acts constituted an infringement of copyright.

**SIXTH DEFENSE**

6. Intervenor-Defendant has failed to mitigate its purported damages and recovery of damages, if any, must be reduced accordingly.

DATED: December 21, 2009

Respectfully Submitted,

/s/ Geoffrey S. Stewart

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*Attorneys for Plaintiffs and Counterclaim  
Defendants*



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on all counsel via the Court's ECF system.

JONES DAY

By: /s/ Chris J. Lopata

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